

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RASHAD D. WOMACK,

Defendant-Appellant.

UNPUBLISHED

August 2, 2005

No. 247233

Wayne Circuit Court

LC No. 00-004971-01

Before: Borrello, P.J., and Bandstra and Kelly, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to five and one-half to ten years in prison for the assault with intent to do great bodily harm less than murder conviction, to run consecutive to two years in prison for the felony-firearm conviction. Defendant appealed and we vacated the judgment of sentence for the assault conviction and remanded for resentencing, holding that the trial court failed to articulate objective and verifiable reasons for its decision to exceed the recommended sentencing guidelines range for the assault conviction. *People v Womack*, unpublished opinion per curiam of the Court of Appeals, issued September 20, 2002 (Docket No. 233776).

On remand, the trial court received a new presentence investigation report, entertained arguments from counsel, detailed its reasons for exceeding the guidelines, and imposed the same sentence. Defendant now appeals as of right from that sentence. We again vacate the judgment of sentence for the assault conviction and remand for further proceedings. This case is being decided without oral argument pursuant to MCR 7.214(E).

The recommended minimum sentence under the legislative guidelines for defendant's assault conviction was five to twenty-three months. Defendant's minimum of five and one-half years, or sixty-six months, is nearly three times the high end of the recommended range.

"A court may depart from the appropriate sentence range . . . if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure." MCL 769.34(3). See also *People v Babcock*, 469 Mich 247, 255-256, 272; 666 NW2d 231 (2003). This legislative language, in light of its statutory and case law history, indicates the legislative intent that deviations from sentencing recommendations follow only from objective

and verifiable factors. *Id.* at 257-258, 272. For purposes of deciding whether to depart from the recommended guidelines range, an abuse of discretion occurs where the trial court chooses an outcome falling outside a “principled range of outcomes.” *Id.* at 269. “[W]hether a factor exists is reviewed for clear error, whether a factor is objective and verifiable is reviewed de novo, and whether a reason is substantial and compelling is reviewed for [an] abuse of discretion.” *Id.* at 265.

“The court shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight.” MCL 769.34(3)(b). Here, the trial court expressly opined that defendant should have received higher scores for offense variables 3 (MCL 777.33—physical injury to victim), 5 (MCL 777.35—psychological injury to member of victim’s family), and 6 (MCL 777.36—intent to kill or injure another individual), but left those scores unchanged, and then used its dissatisfaction with that result to justify its upward departure.

Offense variable 6 addresses the offender’s intent to kill or injure another individual. MCL 777.36. Defendant’s presentence investigation report recommended a score of zero for OV-6. The trial court stated, “frankly, the [d]efendant should have been assessed points there for a premeditated intent to kill.” Indeed, MCL 777.36(1)(a) provides for a score of fifty points for such intent.¹ Because intent is taken into account by the guidelines, the trial court erred in leaving OV-6 at zero and then using defendant’s intent as a basis for departing from the guidelines. MCL 769.34(3)(b).

The trial court also stated, “frankly, the [d]efendant should have been assessed an additional 15 points for offense variable five.” Offense variable 5 concerns psychological injury to the victim’s family members. MCL 777.35(1). MCL 777.35(1)(a) and MCL 777.35(2) provide for a score of fifteen points if serious psychological injury requiring professional treatment occurred, whether or not such treatment has been sought. Again, the trial court erred in leaving OV-5 at zero and then using psychological injury to the victim’s family as a basis for departing from the guidelines. MCL 769.34(3)(b).

The same problem arises in connection with OV-3, which addresses physical injury to the victim. MCL 777.33. Defendant was assessed ten points, which is appropriate for bodily injury requiring medical treatment. MCL 777.33(1)(d). MCL 777.33(1)(c) provides for a score of twenty-five points where the victim suffers “[l]ife threatening or permanent incapacitating injury.” The trial court stated:

¹ MCL 777.36(2)(a) provides that “[t]he sentencing judge shall score this variable consistent with a jury verdict unless the judge has information that was not presented to the jury.” The trial court did not acknowledge MCL 777.36(2)(a); therefore, we decline to consider whether the trial court had a sufficient basis for sentencing defendant based on an intent finding more serious than the one inherent in the verdict itself.

. . . [F]rankly, ten points for someone who has bodily injury that affects their life for the rest of their life, is arguably very legally deficient. Life-threatening, maybe not. But if one person's life-threatening another person's injury the life-threatening injury if the person recovers and can do everything that they could do before, is less serious than a bodily injury where their life is affected for the rest of their life.

The trial court later added, "I do not think ten points was sufficient there because the points don't contemplate the bodily injury that has sustaining effect on a family. And it's life changing and changes someone's ability to work, and [the victim] indicated on the record the difference . . . before the shot and after the shot."

The trial court acknowledged MCL 777.33(1)(c) by conceding that life-threatening injury did not occur, but apparently failed to recognize the companion factor justifying a higher score, "permanent incapacitating injury." The trial court's concern for the victim's apparently permanent reduction of physical abilities would have justified scoring that variable at twenty-five points, but did not justify leaving the score at ten and using the low score as a basis for an upward departure. Had the trial court scored twenty-five points for the injury to the victim, then expressed dissatisfaction with the variable's failure to account for the effect the victim's injuries had on the victim's family, some justification for a departure might have existed.² But leaving OV-3 at ten where the option of a higher score was available, and then using the low score as a basis for departing from the guidelines was error. MCL 769.34(3)(b).

In sum, the trial court declared certain scores to be in error, failed to recognize or otherwise exercise its discretion to correct the errors it thus identified, and then used the deficiencies resulting from those uncorrected errors to justify an upward departure. This compounding of error invalidates the upward departure. A court "by definition abuses its discretion when it makes an error of law." *Koon v United States*, 518 US 81, 100; 116 S Ct 2035; 135 L Ed 2d 392 (1996).

Moreover, the trial court began the resentencing proceeding by stating that "the [presentence investigation report] does not contain some of the information that I relied on exceeding the guidelines and that was the [d]efendant's adjustment on probation." However, the record indicates no prior felonies or history of probation on defendant's part, and the trial court itself later acknowledged the lack of a criminal history. The trial court clarified that defendant's misconduct record in prison before resentencing had no bearing on the sentence, but otherwise never elaborated on its perception of probation issues involving defendant. The trial court's explicit statement that a perceived probation problem partly accounted for its decision to depart from the guidelines, where defendant has never been on probation, with no subsequent clarification or indication that this was mere inadvertence, presents yet another error underlying the upward departure.

² Except insofar as the trial court was referring to psychological injuries to the victim's family, which, as discussed above, is separately accounted for within the guidelines. MCL 777.35.

This multiplicity of errors attendant to the departure render the departure invalid. Accordingly, we vacate defendant's sentence for his assault conviction, and remand this case to the trial court for another sentencing proceeding.³

We reverse and remand. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Richard A. Bandstra
/s/ Kirsten Frank Kelly

³ Defendant also takes issue with the successor circuit judge's refusal to reach the merits of his motion for resentencing, which was heard while this appeal was pending. See MCR 7.208(B)(1). We need not reach that issue, however, because our present disposition of this case renders that question moot. See *People v Rutherford*, 208 Mich App 198, 204; 526 NW2d 620 (1994).